BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARY BAILON Claimant	)	
VS.	)	
INDUSTRIAL UNIFORM CO. INC. Respondent	)	Docket No. 1,021,588
AND	)	
TWIN CITY FIRE INSURANCE CO. Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the April 16, 2007, Award entered by Administrative Law Judge John D. Clark. The Board heard oral argument on August 7, 2007. R. Todd King, of Wichita, Kansas, appeared for claimant. J. Sean Dumm, of Overland Park, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant sustained an injury which arose out of and in the course of her employment with respondent. The ALJ further found that claimant had just cause for not giving respondent notice within 10 days after the accidental injury and that notice was within the 75-day maximum time limit permitted by K.S.A. 44-520. The ALJ also found that claimant had a 33 percent permanent partial impairment to her left upper extremity at the 210 week level.[1]

The Board has considered the record and adopted the stipulations listed in the Award. In addition, during oral argument to the Board, the parties agreed that if this claim

[1] Claimant had surgery to her left shoulder. But in his award computation, the ALJ used 210 weeks, which is the level of the arm rather than 225 weeks, which is the level of the shoulder. See K.S.A. 44-510d(a)(13) and K.A.R. 51-7-8. Either the ALJ did not find claimant's impairment extended to the shoulder or this was an error. It appears to be an error because at page 4 of his Award, the ALJ adopts Dr. Murati's impairment ratings, which include the shoulder.

is compensable, then claimant is entitled to a permanent partial disability award based upon the 225 week level to the shoulder, not the 210 weeks the ALJ used, which is for impairments limited to the arm not including the shoulder.

ISSUES

Respondent first requests leave to file its Application for Review out of time. Respondent contends the Award dated April 16, 2007, was first received in the office of its attorney on May 1, 2007. The envelope in which the Award was received was postmarked April 26, 2007, 10 days after the entry of the Award. During oral argument to the Board, claimant's attorney announced that under the circumstances, he had no objection to the late filing of the Application for Review.

Next, respondent argues that claimant failed to provide it with notice within 10 days of her work injury and did not have just cause for her failure to provide such notice. Respondent further argues that because claimant is an illegal alien and an undocumented worker, she is not entitled to temporary total disability benefits. Finally, respondent requests a credit for the temporary total disability compensation paid claimant during a period of time post-injury that she was employed and working for other employers.

Claimant contends she gave notice on the day of her injury to the person acting as her supervisor. In the alternative, she argues that she provided evidence that supports a finding of just cause for delayed notice. Claimant also argues that her status as an illegal alien does not bar her entitlement to temporary total disability benefits. However, she does not deny that she was working post-accident and may not have been temporarily and totally disabled for all of the weeks that she was paid temporary total disability benefits. Nevertheless, claimant requests that the ALJ's Award be affirmed but that the award calculation be corrected to include the number of weeks of permanent partial disability compensation on the schedule for the shoulder.[2]

The issues to be decided by the Board are:

(1) Is respondent entitled to file a late Application for Hearing?

(2) Did claimant provide respondent with notice within 10 days of her series of accidents?

(3) If not, did claimant have just cause for failing to provide notice within 10 days after the date of accident?

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[2] Neither party argued that claimant should be given two separate awards, one at the level of the forearm for her wrist injury and the other to the level of the shoulder for her shoulder injury.

(4) Is an illegal alien or undocumented worker precluded from receiving temporary total disability compensation due to that status?

(5) If not, was claimant paid temporary total disability benefits during a period when claimant was employed for wages and, if so, is respondent entitled to a credit or offset for an overpayment of temporary total disability benefits against any award of permanent partial disability compensation?

FINDINGS OF FACT

Claimant worked in the production area at respondent. Her duties were sewing and embroidering, which required her to repetitively use her upper extremities. She is claiming injuries to her left arm and shoulder caused by the repetition of her work duties at respondent. Claimant admits she is an illegal alien and that she purchased her social security card in order to work. Her primary language is Spanish, but she speaks some English.

Claimant first started noticing symptoms in August 2004. During the time that claimant was working for respondent and having problems with her left arm and shoulder, respondent did not have a manager over the production area. During this period when there was no production manager, Anthony Taravella and Elaine Stull performed those duties. Also, Kathi Martinez, the accounting department manager, had the responsibility for handling workers compensation issues for respondent.

Mr. Taravella is the president of respondent, as well as a part owner. When he is not available, Ms. Stull is the person in charge. According to claimant, Mr. Taravella told the employees in the production department that since there was no manager of that department, if they had any questions or problems they were to take them to Sylvia Pava. Claimant knew Ms. Pava did not have the title of supervisor. Nevertheless, all the employees talked to her. Claimant said that Ms. Pava trained her when she first started and checked her work. She believed that Ms. Pava was like a supervisor. So when she began noticing problems with her left arm and shoulder, she told Ms. Pava about those problems. She had no conversations about her condition with Mr. Taravella, Ms. Stull or Ms. Martinez, even though she knew if she had an injury she was supposed to report it to Mr. Taravella or Ms. Martinez. Claimant testified that she was not aware of the requirement to report an injury within 10 days, although she admits that information concerning work-related injuries was in her employee handbook and was posted on the bulletin board in the break room. The employee handbook is in English, but the bulletin board notice is in both English and Spanish.

When claimant reported her condition to Ms. Pava, Ms. Pava told her she needed to report the injury to Ms. Martinez. Claimant also claims that Ms. Pava told her to be careful because a former employee reported a work-related injury to her back and was

dismissed from work after receiving medical treatment. Claimant admitted she did not know why the former employee had been dismissed. Claimant stated that she "knew that if I told to the office . . . it was up to me if I risk it."[3] She was concerned that if she was treated by a doctor, the workers compensation insurance carrier would check on her Social Security number and find out that it was not a good number and she would be dismissed. Claimant was having financial problems at the time and was afraid of losing her position.

On January 11, 2005, claimant was called into a meeting. Both Mr. Taravella and Ms. Martinez were present. Mr. Taravella told claimant that business was down and he had to lay her off. He told her that if work increased, he would call her back. She did not say anything to either Ms. Martinez or Mr. Taravella about her injuries at that time. Claimant picked up her final paycheck from Ms. Martinez on January 15 and again did not mention her left arm and shoulder problems. She had no conversations with either Ms. Martinez or Mr. Taravella about any symptoms she was having in her left arm between January 15 and February 18, the day respondent received notice that she was filing a workers compensation claim. Although claimant only picked up her paycheck on January 15, 2005, and performed no work on that date, the parties stipulated to January 15, 2005, as being the date of accident.[4]

Concurrent with working at respondent, claimant was also working 25 to 30 hours a week at McDonald's. She started working at McDonald's in October or November 2004 and continued until April 2005. Her job duties at McDonald's consisted primarily of assembling sandwiches. She was also required to clean the table on which those sandwiches were assembled. She did not perform any heavy lifting at McDonald's.

Shortly after being laid off by respondent in January 2005, claimant obtained a job at BWI. Her duties at BWI also included sewing, but she did no embroidering. She worked from BWI from January 2005 until about two weeks before the regular hearing, which was held on July 19, 2006. She did take three weeks off after she had surgery on her shoulder on October 31, 2005.

Kathi Martinez testified that during the period respondent had no manager for production, all employees were to answer to Mr. Taravella directly. She verified that the notice concerning workers compensation that is posted on the bulletin board has her name as the person who administered workers compensation matters. If an employee has a work-related injury at respondent, the standard procedure would be for the employee to

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[3] P.H. Trans. (Apr. 7, 2005) at 14.

[4] In addition to having noted the parties' stipulation to a January 15, 2005, date of accident, in the body of the Award at page 4, the ALJ made a finding of fact that claimant's last day of work was January 11, 2005 but that claimant's attorney alleged she suffered a series of accidents "each and every working day to on or about January 15, 2005" in his letter to respondent dated February 18, 2005. But in his Award calculation on page 5, the ALJ used January 5, 2005 as the date of accident. This was obviously a typographical error.

notify his or her supervisor. Then either the injured worker or the supervisor would come to Ms. Martinez. Ms. Martinez would notify the workers compensation insurance carrier about the claim. In the fall of 2004 through the spring of 2005, there was no manager over production, and the correct procedure for claimant to file an accident report would have been to go to either Mr. Taravella or Ms. Martinez.

Ms. Martinez first became aware that claimant was claiming a workers compensation injury when respondent received a letter from an attorney on February 18, 2005. Before receiving the letter, she had not received any communication from claimant that she had been injured at work.

Ms. Martinez does not speak Spanish. She has had conversations with claimant in English. She does not recall a conversation with claimant in which claimant showed her a bump on her left wrist. She has never had a conversation with claimant regarding any injuries she may have received, at work or otherwise.

Sylvia Pava worked at respondent from 1998 until May 2006. She acknowledges training claimant at the request of respondent. During the time there was no production manager at respondent, Mr. Taravella assigned the production manager's responsibilities to different people. Ms. Pava was one of the workers who did some of the office work the production manager would have done. Ms. Pava also had keys to the building and would open the building if asked. She is bilingual and at times would interpret for claimant. She acknowledged that during the period when there was no production manager, Mr. Taravella and Ms. Martinez told claimant that if she wanted to ask about anything, she could go to Ms. Pava. The most senior person in production was a Vietnamese lady. At times, Mr. Taravella also instructed employees to go to the Vietnamese lady with their questions rather that Ms. Pava.

Ms. Pava said that claimant talked to her about her left arm problems, and Ms. Pava told her she would need to talk to Mr. Taravella or Ms. Martinez and to ask for the form to report the accident. Ms. Pava had suffered a work-related injury previously, and after Ms. Pava suffered that injury, Ms. Martinez told all the employees, including claimant, that if an accident occurs, they needed to see Ms. Martinez. Ms. Pava translated for claimant at that time.

Ms. Pava did not tell anyone about claimant's problems because she was not a supervisor. She never received a job title of supervisor and did not receive a pay raise for any supervisory jobs. Ms. Pava had no responsibility to discipline claimant. She performed management responsibilities when she entered paperwork into the computer. But that was not part of her regular job; it is a supervisor job. Other employees also helped with the paperwork when Ms. Pava was busy. Ms. Pava did not know whether claimant told Mr. Taravella about her injury. She did not recall claimant ever saying that she was afraid to tell Mr. Taravella because she might get fired.

Ms. Pava said that claimant overheard a conversation between Ms. Pava and a coworker about a previous coworker who had been terminated after suffering a work injury. Ms. Pava did not specifically tell claimant the story about the previous coworker but was aware that claimant heard the story.

Anthony Taravella, the president and co-owner of respondent, said respondent was without a production manager from either 2004 or early 2005 until the fall of 2005. During that period of time, Mr. Taravella assumed those duties. He testified that Ms. Pava had no managerial or supervisory responsibility. There was no question in Mr. Taravella's mind that claimant knew Ms. Pava was not a supervisor.

Claimant's last day of employment was January 11, 2005. She was laid off because business was slow. At the time she was laid off, Mr. Taravella was not aware she had suffered any injuries at work. He did not see anything that indicated to him that claimant had been injured and had never heard anything from any of the employees about any injury or problem regarding claimant. He confirmed that information about reporting accidents and workers compensation is both in the employee manual and is posted in the break room.

Mr. Taravella said that the previous employee who had a workers compensation case and who was no longer working at respondent was not terminated. The insurance carrier had asked Mr. Taravella if the social security number it was provided was correct. Mr. Taravella asked the employee about the number, and the employee disappeared and never came back to work.

Mr. Taravella said that Ms. Pava did not train claimant when she first started working at respondent. He also disagreed that he ever told claimant to take her problems to Ms. Pava. He did agree, however, that Ms. Pava was used as a translator for claimant at times. Mr. Taravella considered claimant to be bilingual and only used an interpreter when it came to an important issue. He did not feel the need to use one on a daily basis when conversing with claimant. He said that claimant could speak English and could have notified him, Ms. Stull or Ms. Martinez if she had been injured, although none of them speak Spanish. He described claimant's English as broken English.

PRINCIPLES OF LAW

K.S.A. 2006 Supp. 44-551(i)(1) states in part:

> All final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a and amendments thereto made by an administrative law judge shall be subject to review by the board upon written request of any interested party within 10 days. Intermediate Saturdays, Sundays and legal holidays shall be excluded in the time computation.

K.A.R. 51-18-2 states in part:

> (a) The effective date of the administrative law judge's acts, findings, awards, decisions, rulings, or modifications, for review purposes, shall be the day following the date noted thereon by the administrative law judge.
>
> (b) Application for review by the workers compensation board shall be considered as timely filed only if received in the central office or one of the district offices of the division of workers compensation on or before the tenth day after the effective date of the act of an administrative law judge.

In *Nguyen*,[5] the Kansas Supreme Court stated:

> Where the legislature has provided the right of an appeal, the minimum essential elements of due process of law in an appeal affecting a person's life, liberty, or property are notice and an opportunity to be heard at a meaningful time and in a meaningful manner.
>
> The reason due process requires notice to a party is to ensure that the party having the right to appeal has actual knowledge that an adverse judgment has been rendered. To satisfy due process, notice must be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

In *Johnson*,[6] the Kansas Supreme Court stated:

> Although there is nothing in the record of this case to show that the ALJ who issued Johnson's award made an error in Johnson's counsel's address, as the ALJ did in Nguyen's counsel's address, it is undisputed that Johnson's counsel received no actual notice of the date of the ALJ decision until the 10-day appeal time had effectively expired. It is also undisputed that Johnson's counsel had no reason to suspect that the ALJ's decision must have been issued before May 24, given the 30-day merely directory time limit imposed for a decision from the ALJ.
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> Under these circumstances, we choose to follow *Nguyen*'s due process ruling, holding that the lack of actual receipt of notice by Johnson's counsel tolled the statutory 10-day limit.

K.S.A. 44-520 states:

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[5] *Nguyen v. IBP, Inc.*, 266 Kan. 580, Syl. ¶¶ 4, 5, 972 P.2d 747 (1999).

[6] *Johnson v. Brooks Plumbing*, 281 Kan. 1212, 1216-17, 135 P.3d 1203 (2006).

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

ANALYSIS

Respondent's Motion for Leave to File Application for Review is granted. Excluding intervening Saturdays, Sundays and legal holidays, 10 days from the April 16, 2007, date of the ALJ's Award is May 1, 2007. Respondent received the ALJ's Award on May 1, 2007. The 10-day time limit to file an appeal cannot expire while respondent has no notice that an Award has been entered and without giving respondent a reasonable time to appeal. The absence of such notice tolls the 10-day appeal time.

January 15, 2005, is the agreed-upon ending date for claimant's series of repetitive trauma accidents suffered while working for respondent. Claimant failed to provide notice of accident to respondent within 10 days following January 15, 2005. The ALJ found that the notice of accident claimant gave to Ms. Pava did not satisfy the requirements of K.S.A. 44-520 because Ms. Pava was a coworker and was not a supervisor. Ms. Pava was not a person authorized by respondent to receive notice of accident. In fact, claimant admitted that she knew Mr. Taravella and Ms. Martinez were the persons she was to report an accident to. Moreover, Ms. Pava specifically advised claimant that she needed to report her accident to Mr. Taravella or Ms. Martinez, not to her, and to ask for an accident report form to complete. The Board agrees with the ALJ that claimant's conversation with Ms. Pava concerning her injury was not notice to her employer.

The ALJ, however, further found that claimant established she had just cause for not reporting her accident within 10 days and, therefore, her time to report was extended to 75 days because claimant was afraid of losing her job. The Board disagrees with this conclusion. First, fear of being discovered that she was working illegally is not just cause. It is a reason and it is completely understandable, but claimant's illegal conduct cannot be condoned or ratified as "just." Furthermore, there has been no showing that respondent

has unclean hands by having a practice or custom of knowingly hiring illegal or undocumented workers and then firing them when such a worker is injured and makes a claim for workers compensation benefits. Second, claimant's motivation and reason for not reporting her accident diminished significantly as of January 11, 2005, when she was told she was being laid off. Yet, she still did not report her accident and injury at that meeting or within 10 days of January 15, 2005, the stipulated date of accident. Granted, claimant was not told she was being terminated at that meeting on January 11, 2005, but was, instead, told she was being laid off due to economic conditions and was subject to being recalled when conditions improved. Nevertheless, claimant's rationale for just cause was weakened as of that January 11, 2005, meeting, and her argument of having proven just cause to extend her time for giving notice of accident from 10 days after January 15, 2005, to 75 days fails.

Based upon the Board's finding of no timely notice, the remaining issues are rendered moot.

CONCLUSION

Claimant did not provide respondent with timely notice of accident and, therefore, her claim for workers compensation benefits is denied.

The Board notes that the ALJ did not award claimant's counsel a fee for his services. The record does not contain a fee agreement between claimant and her attorney. K.S.A. 44-536(b) requires that the Director review such fee agreements and approve such contract and fees in accordance with that statute. Although no temporary total disability or permanent partial disability compensation is awarded, claimant was paid temporary total disability prior to the final award. Should claimant's counsel desire a fee from the temporary total disability compensation previously paid, he must submit his contract with claimant to the ALJ for approval.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated April 16, 2007, is reversed.

IT IS SO ORDERED.

Dated this _____ day of August, 2007.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

DISSENT

We respectfully disagree with the majority and find that claimant's fear of losing her job constituted "just cause" for failing to promptly report her injury. The majority's holding merely encourages employers to terminate injured workers under false pretenses.

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BOARD MEMBER

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BOARD MEMBER

c: R. Todd King, Attorney for Claimant
J. Sean Dumm, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge